WONG KWAI & ANOR. v. PRESIDENT TOWN COUNCIL, JOHORE BAHRU

[O.C.J. (Syed Othman J.) June 22, 1970]

[Johore Bahru — Criminal Revisions No. 1 of 1970]

Administrative Law — Demolition order — Application for demolition order must be made by President or Deputy President, Town Council — Right of owner to be heard — Audi alteram partem — Town Boards Enactment, (Johore No. 118) s. 92(i).

In this case the applicant had been charged with the offence of erecting a semi-permanent building in contravention of the Town Board Bye-Laws and punishable under section 92(i) of the Town Boards Enactment. On his plea of guilty the learned magistrate fined him $150 and ordered him to demolish the building within two months. Subsequently the applicant was charged with the offence of not complying with the order of the magistrate and convicted and fined. The President, Town Council then took steps to demolish the building. The applicant through his solicitors applied for revision of the demolition order on the ground that the learned magistrate before making the order had not given the applicant an opportunity to be heard.

Held: (1) an application for a demolition order must be made by the President or Deputy President Town Council and as there was nothing on the record in this case to show who made by the President or Deputy President, Town Council and was made that prior notice of the application had been given to the applicant, the learned magistrate had no jurisdiction to make the demolition order and it must be set aside;

(2) the learned magistrate should have given the applicant an opportunity to be heard before making the order.

Cases referred to:-

(1) *Lee Yew* v. *Public Prosecutor* [1953] M.L.J. 211.

(2) *Local Government Board* v. *Arlidge* [1915] A.C. 120.

CRIMINAL REVISION.

Chin Hon Ngian for the applicant.

Syed Othman J.: A number of applications are now before me for revision of demolition orders made by the magistrate's court at Johore Bahru in a number of similar cases. I shall deal with one of them more fully than the others in order to remind the court below of its duty when dealing with future cases. There has been a sad remiss of the decision of Bellamy J. in *Lee Yew* v. *Public Prosecutor*,[1] which is cited in the applications.

The applicant in this case was charged with an offence of having erected a semi-permanent building in contravention of By-law 1 Part I of the Town Board By-laws and section 92(i)(c) of the Town Boards Enactment (No. 118). On his plea of guilty, the learned magistrate convicted him and fined him $150. The record shows that the learned magistrate then made an order requiring the applicant to demolish the building within two months. The building was not demolished. Some months later the applicant again appeared on a summons issued by the court. He was charged with an offence of not complying with the order of the magistrate to demolish the house under sub-section (ii) of section 92. He was convicted and fined $100 in default 2 weeks imprisonment. In January this year the President, Town Council took steps to demolish the building in accordance with sub-section (iii) of section 92 of the Town Boards Enactment. The applicant had failed to comply with the provision of this sub-section which reads: —

"92. (iii) Where a person convicted under the provision of sub-section (ii) of failing to comply with an order to demolish a building fails within fifteen days of the date of such conviction to demolish such building, the President may proceed in the manner prescribed in sub-section (ii) of section 84."

In view of the proposed action, the applicant through his solicitors, has now applied for a revision of the demolition order on the ground that the learned magistrate before making the order had not given the applicant an opportunity of being heard.

The decision of Bellamy J. in *Lee Yew* v. *Public Prosecutor* is based on section 92(i) of the F.M.S. Town Boards Enactment (Chapter 137) which is in *pari materia* with section 92(i) of the Johore Enactment. The relevant portion relating to the powers of the magistrate in the sub-section of the Johore Enactment reads "... a magistrate may on the application of the President, make an order requiring such person to alter in any way or to demolish the building." It is clear that the word "may" in this provision imports a discretionary power. The magistrate has the discretion to make an order either requiring an offender to alter the building in any way or to demolish it.

From the provision it should be clear that if during an inquiry it is shown that the situation could be remedied in any way, the court should not make a demolition order but should direct the offender to alter the building to meet with the requirements of the law. As far as I can see on the wording of the provision, a demolition order should only be made as a last resort and not as a matter of first choice, much less as a matter of course after conviction.

In the above cited case Bellamy J. held in effect since the application for a demolition was made by a health inspector and not by the chairman or deputy chairman, the magistrate had no jurisdiction to make the order. The learned judge then dealt with the question of the exercise by the magistrate of his discretion to make the order. The portion of his judgment which should be noted reads as follows: —

"... There is also nothing on the record to show that the accused had prior notice that such an application was to be made. Although it may well have been appended to the summons, a copy of which is not before me. It is in my view contrary to fundamental justice to make such an order without giving the offender some notice of the application and an opportunity of being heard. Notice of the application could conveniently be given by appending it to the summons or at the hearing itself; but if the first intimation the accused has of the application is at the hearing he should be given a reasonable opportunity, by a postponement if need be, of answering it. In this case, the magistrate did not give the accused an opportunity of being heard and, in my opinion, in omitting to do so he misdirected himself and his subsequent order requiring demolition of the building cannot be sustained."

There are many authorities which require a tribunal which is given a discretionary power as in this case, to exercise that power judicially. This means that before the tribunal can make a decision, the rule of *audi alteram partem* must be observed. The principles underlying this rule provide minimum safeguards for justice. If the tribunal fails to observe them a decision reached loses its judicial character. I need only quote here the well-known words of Viscount Haldane in *Local Government Board* v. *Arlidge*,[2] in which he

enunciated the essential requirements of a judicial decision: —

"... those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice."

In the present case, the main business of the court concerning the applicant was the charge in respect of the offence under sub-section (i) of section 92 of the Enactment. It was disposed of on the plea of guilty. A conviction under the sub-section is merely a step which enables the President or Deputy President, Town Council, to make the application; which in turn gives the court jurisdiction to determine it. There is nothing to show on the record who made the application for demolition or, if such an application was made, that prior notice of the application had been given to the applicant. Apparently the learned magistrate made the order as a matter of course after convicting the applicant of the offence.

On the face of the record, I find that the learned magistrate had no jurisdiction to make the demolition order because it was not made on the application of the President or Deputy President, Town Council. (In section 2 of the Enactment the word "President" is defined to include a Deputy President). The order is set aside.

I also set aside the conviction and sentence in respect of the offence under sub-section (ii) of section 92 and order that the fine of $100, if paid, to be refunded as the conviction and sentence rested upon a demolition order in respect of which the learned magistrate had no jurisdiction to make.

The President, Town Council, however is at liberty to make a fresh application to a magistrate under the provisions of sub-section (i) of section 92 of the Enactment. If such an application is made I am of the view that the matter should be heard before another magistrate who should bear in mind the principles which have been expressed by Bellamy J. in the above quoted case and which I have attempted somewhat to expand.

Demolition order, conviction and sentence, set aside.

Solicitors: *Yeow & Chin.*

MOHAMED ISA & ORS. v. ABDUL KARIM & ORS.

[O.C.J. (Raja Azlan Shah J.) June 22, 1970]

[Ipoh — Civil Suit Nos. 464 and 514 of 1969]

Land Laws — Malay Reservations — When ceases to be reserved land — Mining certificate issued in respect of reserved land — Mining lease subsequently issued — Agreements relating to land — Mining Enactment (F.M.S. Cap. 147) — Malay Reservations Enactment (F.M.S. Cap 142), ss. 4 and 5.

The facts and arguments as set out in the judgment of Raja Azlan Shah J. are as follows:-

These two cases concerned a piece of land in Malay Reservation, in respect of which a mining certificate was issued jointly to the first, second and third defendants. The mining certificate *inter alia*, stipulates that "the lessees shall not enter into mining contracts with non-Malays except for the purpose of constructional works only" and further "that the land hereby leased shall not be transferred except to such person or persons as may be approved by the Ruler in Council." The said certificate was later replaced by a mining lease for a period for ten years from the date of registration (*i.e.* on July 1, 1964).

A power of attorney was executed by the first three defendants in favour of the first and second plaintiffs and the fourth and fifth defendants on December 20, 1965, whereby they were empowered "to lease or sub-lease or sub-sublease or enter into any agreements or contracts with any person or persons, company or companies." This power of attorney was however, revoked on October 14, 1968.

By an agreement made on February 23, 1966 between the first and second plaintiffs and the fourth and fifth defendants for themselves and as attorneys of first, second and third defendants on the one part and Chew, Wong and Liew on behalf of the sixth defendants, Wan Seng Mining Company Sendirian Berhad (which was still not formed then) on the other part, it was agreed that Chew, Wong and Liew would be entitled to enter and to prospect for tin ore on the said land. The first, second and third defendants had themselves, on January 9, 1967, entered into a similar agreement with Chew, Wong and Liew on the same terms and by which they took an advance of $2,500 from Chew, Wong and Liew. On January 18, 1967, by an agreement between one Mohamed Zahari, Chew, Wong and Liew on the one part and one Madam Vu on behalf of the sixth defendants on the other part, the first party assigned and transferred all their rights, interests and benefits to the second party, on behalf of Wan Seng Company Sendirian Berhad (the sixth defendants).

On June 28, 1967, the first, second and third defendants executed a permit to mine for a period of one year from date thereof in favour of the first and second plaintiffs and the fourth and fifth defendants. This permit to mine was subject to yearly renewals. On the same day, a sub-lease was also executed by and in favour of the same parties for the period of the said mining lease and renewals and extensions thereof.

About a year later, *i.e.*, on August 22, 1968, the parties were supposed to meet at the office of Mr. Lal Harcharan Singh, an advocate and solicitor, to sign three documents purportedly in pursuance of the agreements made on February 23, 1966 and on January 9, 1967. All the three documents were apparently drawn in the names of the first three defendants on the one part and the first and second plaintiffs and the fourth and fifth defendants on the other part. The three documents were substantially in identical terms. The first and second plaintiffs did not turn up. For some reason or other their names were deleted from the three documents. There were also certain other deletions made so as to meet the parties' purposes. The three documents were: (1) a permit to mine for a period of one year from August 22, 1968 (hereinafter referred to as the First Permit to Mine); (2) another permit to mine for a year to take effect as from August 22, 1969, *i.e.* a year later after the First Permit to Mine has expired, (hereinafter referred to as Second Permit to Mine); (3) a sub-lease for the period of the mining lease and renewal or extensions thereof. In return for this the sub-lessors (*i.e.*, the first three defendants) were entitled to a tribute upon all ore removed from the said land at the rate of 12%. All these documents were executed on the same day. The First Permit to Mine was stamped on August 24, 1968 and recorded at the Mines Office, Ipoh on May 23, 1969. The Second Permit to Mine was stamped a year later (*i.e.*, on August 2, 1969), and the sub-lease was stamped on June 8, 1969. Subsequently, on September 14, 1968, the fourth and fifth defendants entered into an agreement with the sixth defendants employing the latter to mine the said land.

However, on January 21, 1969, the first, second and third defendants sub-leased the said land to the first and second plaintiffs for the period of the mining lease and renewals or